

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

KIMBERLY HAYSBERT,	:	APPEAL NO. C-150243
	:	TRIAL NO. A-1401666
Plaintiff-Appellant,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
HABEEB D. ZIADEH,	:	
Defendant-Appellee,	:	
and	:	
OHIO BUREAU OF WORKERS'	:	
COMPENSATION,	:	
CITY OF CINCINNATI,	:	
and	:	
JOHN DOE,	:	
Defendants.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Plaintiff-appellant Kimberly Haysbert contests the trial court's entry of summary judgment in favor of defendant-appellee Habeeb D. Ziadeh. Haysbert claimed that on March 21, 2012, Ziadeh had negligently operated an automobile which struck and injured her.

Ziadeh moved for summary judgment alleging that Haysbert's claim was barred by the doctrine of judicial estoppel. Ziadeh argued that Haysbert had filed for Chapter 13 bankruptcy on March 9, 2009, had completed paying her creditors in 2014, and had been granted discharge in bankruptcy on August 12, 2014, five months after filing this action against Ziadeh. In support of his motion, Ziadeh attached copies of the pleadings and schedules that Haysbert had filed in the bankruptcy court. None of those documents reflected that Haysbert had disclosed her personal-injury claim against Ziadeh to the bankruptcy court or to her creditors.

In her memorandum in opposition, Haysbert acknowledged that she had not informed the bankruptcy court of her claim. Haysbert's memorandum was supported by her affidavit in which she stated that the accident had occurred more than three years after her bankruptcy plan had been confirmed, and that as a layperson, she did not know what a contingent or unliquidated claim was, and was unaware of any continuing obligation to disclose her personal-injury claim.

The trial court found that judicial estoppel applied, and granted summary judgment for Ziadeh, adding its certification that no just cause for delay remained. *See* Civ.R. 54(B).

In a single assignment of error, Haysbert challenges the entry of summary judgment. We review the trial court's summary-judgment ruling *de novo*. *See Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Summary judgment is proper if (1) no genuine issues of material fact remain to be litigated; (2) the moving party is entitled to summary judgment as a matter of law; and (3) it appears from the evidence, when viewed in a light most favorable to the nonmoving party, that reasonable minds can only come to a conclusion adverse to that party. *See* Civ.R. 56(C).

The doctrine of judicial estoppel forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding. *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, 879 N.E.2d 174, ¶ 25. Contrary to Haysbert's assertion, judicial estoppel may be enforced by summary judgment. *See id.*

A debtor seeking shelter under the bankruptcy laws has a statutory duty to disclose all assets, or potential assets, to the bankruptcy court, including contingent and unliquidated claims. *See* 11 U.S.C. 521, 541(a)(7), 1303, and 1306(a); *see also Greer-Burger* at ¶ 27. That duty is a continuing one that does not end "once the forms are submitted to the bankruptcy court; rather the debtor must amend [her] financial statements if circumstances change." *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1274 (11th Cir.2010). "The disclosure obligations of consumer debtors are at the very core of the bankruptcy process and meeting these obligations is part of the price debtors pay for receiving the bankruptcy discharge." *In re Colvin*, 288 B.R. 477, 481 (Bankr.E.D.Mich. 2003). Thus the omission or nondisclosure of a cause of action as an asset in bankruptcy provides an appropriate basis for the imposition of judicial estoppel. *See Greer-Burger* at ¶ 27-28.

On appeal, as in the trial court, Haysbert acknowledges that she had an obligation to amend her bankruptcy filings to include her personal-injury claim against Ziadeh, and that she failed to discharge that obligation. But she maintains that judicial estoppel is inappropriate because her conduct amounted to nothing more than mistake or inadvertence. *See Saha v. Research Inst. at Nationwide Childrens Hosp.*, 10th Dist. Franklin No. 12AP-590, 2013-Ohio-4203, ¶ 16. A failure to disclose a cause of action in bankruptcy may be deemed inadvertent where the debtor lacks knowledge of the factual

basis of the undisclosed claim, where the debtor has no motive for concealment, or where the evidence indicates an absence of bad faith. *See Greer-Burger* at ¶ 29.

Without question, neither Haysbert nor her bankruptcy-court counsel could have known of her personal-injury claim when she filed her petition, or when the plan was confirmed by the bankruptcy court, some three years before the accident. But construing the facts most strongly in Haysbert's favor, as we must, she clearly knew of the accident—the factual basis of her claim against Ziadeh and others—28 months before her discharge in bankruptcy. The docket of proceedings in the bankruptcy court, attached to Ziadeh's motion for summary judgment, reveals numerous court filings after the March 2012 accident date, including several objections to claims and the trustee's certification of final payment and case history. Yet, Haysbert and her counsel made no attempt to inform the bankruptcy court of her claims for money damages in this lawsuit. *See Kimberlin v. Dollar Gen. Corp.*, 520 Fed.Appx. 312, 314 (6th Cir.2013) (finding debtor had a duty to disclose even when debtor had acquired an asset 41 days *after* the final payment of a bankruptcy plan was made).

Two years after the accident—four months before the trustee's certification, and five months before the discharge in bankruptcy—Haysbert, represented by different counsel, filed this action against Ziadeh. Construing the evidence most strongly in her favor, we hold that Haysbert's failure to disclose the personal-injury claim to the bankruptcy court was not inadvertent. She was aware of her personal-injury claim long before the discharge in bankruptcy, and there was no reason not to notify the court and list it as an asset. *See Greer-Burger*, 116 Ohio St.3d 324, 2007-Ohio-6442, 879 N.E.2d 174, at ¶ 29.

Haysbert's assertion of legal ignorance was not sufficient to demonstrate inadvertence, particularly when she was represented by counsel in both her bankruptcy

and personal-injury matters. *See Harrah v. DSW Inc.*, 852 F.Supp.2d 900, 907 (N.D. Ohio 2012) (stating that “[i]t does not appear that any court has accepted ignorance of the law as an excuse for a party’s failure to comply with the requirement of full disclosure”). Moreover, Haysbert had a motive to conceal her claim to minimize the assets available for distribution to her creditors, and the evidence indicates not an absence of bad faith, but only that she failed to take timely action to inform the bankruptcy court of the claim’s existence. *See Greer-Burger* at ¶ 29.

No genuine issue of material fact remains for resolution. By pursuing her personal-injury claim against Ziadeh, a claim which was not disclosed as an asset in the bankruptcy court, Haysbert has taken a contrary position, under oath, which was accepted by that court. *See Greer-Burger* at ¶ 25 and 29. She is judicially estopped from pursuing this claim, and Ziadeh is entitled to judgment as a matter of law.

The assignment of error is overruled. Therefore, we affirm the trial court’s judgment.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., DEWINE and MOCK, JJ.

To the clerk:

Enter upon the journal of the court on June 22, 2016
per order of the court _____.
Presiding Judge